Supreme Court, U.S.
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No. 02-1724

IN THE

Supreme Court of the United States

SECURITIES AMERICA, INC.,
Petitioner,

v.

CHARLES P. ROGERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, allows a court to decide that an arbitration clause, which was incorporated into a securities customer application form that was illegally executed with a forged signature, is not enforceable.

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The slip opinion of the Supreme Court of Alabama, Pet. App. 1a-14a, is not yet published, and the order of the Circuit Court of Jefferson County, Pet. App. 15a, is unpublished.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered November 8, 2002. A motion for re-hearing was denied on February 7, 2003. Pet. App. 16a. Justice Kennedy, as Circuit Justice, granted a 15-day extension of time to the Petitioner to file its petition. The Petitioner filed its petition on May 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Each customer application form upon which Petitioner relies in seeking arbitration in this case bears, on the one hand, the true and legal signature of a Respondent and, on the other hand, the false and illegal signature of "Allen Hengst"—a signature forged by Scott Wolas.[1] Scott Wolas is a fugitive from justice who fled New York in the mid-1990s after allegedly engaging in investment fraud. He is currently under indictment.

Wolas surfaced in Florida assuming the identity of Allen Hengst, a librarian in the District of Columbia with whom he had roomed in college.[2] Petitioner Securities America, Inc.

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[1] The forged signature of "Allen Hengst" is on each and every customer application form signed by the Respondents. Pet. App. 3a (C 67-107 of the record on appeal). The Respondents' Appendix includes, as a representative sample, the New Account Application signed by Respondent George Edwards and by Wolas, who forged the signature of "Allen Hengst." Resp. App. 1a.

[2] The "real" Allen Hengst lost touch with Wolas after they left college. After years apart, Wolas contacted Hengst in 1996 asking for a place to stay. Hengst allowed Wolas to live with him in Washington, D.C. for

("SAI"), a securities broker-dealer, hired Wolas, who used the alias "Allen Hengst," as a securities salesman in Florida.

Wolas subsequently registered with the Alabama Securities Commission under the false name "Allen Hengst." Masquerading as SAI salesman Hengst, Wolas solicited investments in fake gold certificates, among other things, from ten individual investors (the "Investors") who resided in Alabama.[3] He signed SAI's standard customer application forms with five of the Investors, forging the name "Allen Hengst."[4] The application forms incorporated an arbitration clause. Sometime during December 2000 or January 2001, Wolas absconded with the Investors' money and currently remains a fugitive from justice.

When SAI refused to make the Investors whole, they filed suit against SAI, claiming losses aggregating over $1 million. The Investors asserted claims of fraudulent misrepresentation; fraudulent suppression; negligent or wanton hiring, training,

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approximately four months. At that time, Wolas was wanted by New York authorities in connection with securities fraud that he allegedly committed as an attorney in New York. Wolas left Washington, D.C. in June 1996. Shortly thereafter, Wolas assumed Hengst's identity. The real Allen Hengst remains a librarian in Washington, D.C.

[3] Khris McAlister, Robert McCullough, Charles Rogers, Margaret Rogers, William Ringland, Adrian Ringland, Jr., Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro invested in these fake gold certificates. Before this Court, Petitioner SAI only challenges the arbitrability of the claims of Adrian Ringland, Jr., Adrian Ringland, III, Bertha Ringland, George Edwards, and John Taliaferro, the only Investors who signed customer application forms.

[4] Though Wolas has not yet formally been charged with the crime of "forgery" under Alabama Code § 13A-9-3, Respondents use the term in its common sense: "A signature of a person that is made without the person's consent and without the person otherwise authorizing it." BLACK'S LAW DICTIONARY 650 (6th ed. 1990). It is undisputed that Wolas signed Hengst's name without Hengst's consent.

and supervision; breaches of fiduciary duties owed to the Investors; and for violations of the Alabama Securities Act arising out of the investments Wolas sold on behalf of SAI.

SAI moved to compel arbitration, but did not dispute that Wolas had registered under the false name "Allen Hengst" with the Alabama Securities Commission or that he had falsely signed the name "Allen Hengst" on the customer application forms that he had executed with the five Investors. The Investors opposed this motion. The trial court denied the motion to compel arbitration. The Supreme Court of Alabama affirmed.

REASONS FOR DENYING THE WRIT

"'[A]rbitration is a matter of contract . . . .'" *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).[5] A contract must be formed by the legally valid assent of at least two parties. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 9 & 12 (1981). "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative . . . ." 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1139A at 398 (3rd ed. 1967). Because Wolas

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[5] The Federal Arbitration Act provides:

> A *written provision in* any maritime transaction or *a contract* evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphases added).

forged the signature "Allen Hengst" on every customer application document, there was no legally valid assent and thus no contract that could have incorporated the arbitration clause. The Investors' claims are for the courts to decide.

I. BECAUSE THE ARGUMENT AND THE DECISION ON THE MERITS BELOW IN THIS FACT-BOUND CASE ADDRESSED THE MAKING OF THE CONTRACTS, *FIRST OPTIONS*, NOT *PRIMA PAINT*, CONTROLS.

As a preliminary matter, it is necessary to clarify the arguments made below in order to frame the question presented by this case. The parties disagree as to whether this case deals with the enforceability of a contract after it was validly made or with a challenge to both the formation of a contract and its enforceability. Petitioner argues that the Investors conceded that legal contracts were validly made and existed, and only challenged the enforceability of the contracts due to a lack of compliance with the Alabama Securities Act. Pet. 10. Thus, Petitioner contends that *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), which required arbitration of a fraudulent inducement challenge to a contract that was admittedly assented to by both parties, governs this case. Respondents contend, and the record demonstrates, that while they admitted the physical existence of the contract forms and their signatures on them, they consistently challenged both the making of the contracts—their legal existence—and their enforceability if they were found to have been validly made. Thus, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which governs the arbitrability of challenges to the formation, or legal existence, of a contract, governs this case.

Specifically, Petitioner contends:

> The Signatory Plaintiffs resisted arbitration, but in doing so conceded three important points: (1) *the*

> *existence of and their assent to the arbitration agreements*; (2) that the transactions in question substantially affected interstate commerce; and (3) that the arbitration agreements applied to their claims. Pet. App. 9a. The grounds of Plaintiffs' resistance to arbitration did not go to the making of the agreement to arbitrate. Instead, they contended that the underlying New Account Agreements were unenforceable under ALA. CODE § 8-6-19 (g) because Scott Wolas was not registered under the Alabama Securities Act in that name. The unenforceability of their application agreements, they contended, also made the arbitration provisions within them unenforceable.

Pet. 10 (emphasis added).

In a footnote, the Petitioner further asserts:

> These concessions make it "clear and unmistakable" that the parties agreed to arbitrate the Plaintiffs' challenge to the legality of the underlying agreements with SAI. The question of arbitrability is therefore not for judicial determination. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) . . . .

Pet. 10 n.2.

It is certainly true that the Investors did not dispute the *physical* existence of the form "contracts"—the customer application forms—and did not dispute that they affixed their true and legal signatures to those forms. However, the Investors did dispute, and thus did not "concede," the *legal* existence of valid and binding contracts based on SAI's and Wolas's illegal acts, including the forging on each and every customer application form of the signature "Allen Hengst," the criminal alias of the fugitive Wolas. *See, e.g.*, Resp. App. 1a.

Before the trial court, the Investors did not assert a claim for breach of contract or seek rescission of a contract because it was their position and the clear law that no contract had been made. Further, the Investors argued:

> Wolas, *using the alias "Allen Hengst," signed the agreements* on behalf of SAI as its "registered representative."
>
> . . . .
>
> If an individual uses a false or assumed name to secure a license to transact any business in this state as a dealer or agent for securities or as an investment advisor, that individual has violated ALA. CODE § 8-6-3 (d) and is *not properly licensed under Alabama law to transact any business* as a dealer or agent for securities or as an investment advisor. *See* ALA. CODE § 8-6-3 (j) (1).

(C. 167, 169-70) (emphases added).

On pages 19 and 20 of their brief to the Supreme Court of Alabama, the Investors further argued:

> *The trial court, and not the arbitrator, decides the ultimate question of the legality and enforceability of the contract. Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 317 (Ala. 2000). As this Court in *Harris* stated:
>
> > "[W]e have adopted the reasoning that 'a party who contests the *making of a contract* containing an arbitration provision can not be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate,' and that '[o]nly a court can make that decision.'"
>
> *Id.*; *quoting NationsBanc Invs., Inc. v. Paramore*, 736 So. 2d 589, 593 (Ala. 1999), (*quoting Shearson Lehman*

Bros., Inc. v. Crisp, 646 So. 2d 613, 616-17 (Ala. 1994) (emphasis in *Shearson Lehman Bros.*)).

(Emphases added).[6] Accordingly, the issue of the making of the contracts was raised. *See Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982); *Picard v. Connor,* 404 U.S. 270, 278 (1971).

The Supreme Court of Alabama's opinion thus states:

> The signatory plaintiffs argue that the SAI customer agreements containing the arbitration provision cannot be enforced, because, they argue, the Act "prohibits enforcement of *contracts made* in violation of its provisions." Brief of Appellees, at 9. SAI responds that the Act "offers no impediment to the enforcement of the arbitration agreements," because "SAI did not know that [Wolas, masquerading as Hengst,] was anyone other than who he purported to be.
>
> . . . .
>
> Section 8-6-19 (g) provides, in pertinent part:
>
> > "(g) No person who has made or engaged in the performance of any contract in violation of any provision of this article . . . *or* who has acquired any purported right under such contract *with knowledge of the facts by reason of which its making or performance was in violation*, may base any action on the contract."

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[6] On page 9 of their Brief in Opposition to Rehearing before the Supreme Court of Alabama, the Investors argued:

> The contracts are void and unenforceable because the contracts as a whole violate Alabama law. Stated differently to satisfy SAI, *the contracts never existed because they were entered into in violation of Alabama law. See Harris*, 794 So. 2d at 316 (finding that a challenge to the legality of the contract is a challenge to the contract's existence).

(Emphasis added).

. . . .

> Therefore, we read it as stating, in relevant part, that "no person who has *made* or engaged in the performance of *any contract in violation* of any provision of the Act may base any action on the contract." Therefore, SAI is not entitled to enforce the arbitration provision in its customer agreements.

Pet. App. 11a (first, second, fifth, and sixth emphases added).

Thus, this case was argued and decided on the merits based on challenges to the legality of both the making and the performance of the purported contracts.[7] Because the making—formation—of the purported contracts, which incorporated the arbitration clause, is at issue, *First Options,* and not *Prima Paint,* controls.

This simply is not a case in which a securities brokerage company's salesman, acting in good faith, technically failed to comply with a state securities law, signed a customer application form containing an arbitration clause, and had the customer assert the technical violation to avoid arbitration of

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[7] The basis of the Supreme Court of Alabama's decision is somewhat unclear. For the Investors who did not sign the customer application forms, the court held that they could "not be required to submit to arbitration any dispute [they] ha[ve] not agreed to submit." Pet. App. 8a (internal quotations and citations omitted). For the Investors who did sign the customer application forms, the court stated that while they "did not dispute the existence of contracts calling for arbitration, . . . they did contend that the agreements are not valid and enforceable." Pet. App. 9a. A contract may not be "valid," of course, both because it was never made and because it cannot be performed. The peculiar history of this case involves Wolas's use of a forged signature to make the purported contracts, the Investors' repeated challenges to the "making" of the contracts, and the court's basing of its decision on a statute that invalidates "any contract" "made" in violation of the securities laws. Thus, the Alabama Supreme Court's decision cannot be regarded as based solely and completely on the erroneous assumption that the Investors "conceded" that the underlying contracts were validly and legally made.

a claim. Instead, this is a case in which a securities brokerage company hired a fugitive from justice who, acting in bad faith, purposely violated state securities law, forged a signature on customer application forms containing an arbitration clause, and had the customers assert the purposeful violation and the false signature to avoid arbitration of their claims. Accordingly, this case involves the questions whether and how a court should decide a challenge to arbitration involving the making, or formation, of the "contract" incorporating the arbitration clause. This Court answered these questions in *First Options*.

II. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, THOSE FEDERAL CIRCUIT COURTS OF APPEAL THAT ADDRESS FAILURE TO ASSENT TO A CONTRACT CONTAINING AN ARBITRATION CLAUSE, OR THE STATE COURTS OF LAST RESORT.

A. The Decision of the Supreme Court of Alabama Does Not Conflict With the Decisions of This Court.

In *First Options*, 514 U.S. at 943, this Court stated:

> [T]he question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. . . . If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to

> arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

This Court then addressed how a court should decide an issue of arbitrability:

> *When deciding whether the parties agreed to arbitrate a certain matter* (including arbitrability), *courts* generally (though with a qualification we discuss below) *should apply ordinary state-law principles that govern the formation of contracts. . . .*
>
> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: *Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.*

First Options, 514 U.S. at 944 (fourth, fifth, sixth, and seventh emphases added).

Petitioner cannot point to the arbitration provision in this case for "'clear and unmistakable' evidence" that the parties agreed to arbitrate the issue whether there were ever legal and binding contracts between the parties such that the arbitration clause would be applicable to the Investors' claims against SAI. The arbitration clause relied on by SAI simply provides for the arbitration of "all controversies" that concern "any order or transaction, or the continuation, performance, or breach" of the customer agreement or any other agree-

ment.[8] It does not provide for the arbitration of matters that concern the making or formation of the contract in the first place. *See, e.g., Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1012 (11th Cir. 1998) (holding that district court correctly decided issue of arbitrability when "[t]he agreement in this case does not contain any language specifically authorizing the arbitration panel to decide arbitrability issues..."), *cert. denied*, 525 U.S. 1068 (1999); *McLaughlin v. Terminix Int'l Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (holding that the district court correctly determined the issue of arbitrability because "neither the arbitration clause nor any other provision in the 1984 contract between [the parties] clearly and unmistakenly evidenced the parties' intent to give the arbitrator power to determine arbitrability"); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) (holding that arbitrability is determined by the trial court when "nothing in the agreement between [the parties] clearly stat[ed] that the question of arbitrability of judgments should be decided by an arbitrator"); *cf.*

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[8] The arbitration clause that was incorporated into the customer application forms simply provides:

> I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN US CONCERNING ANY ORDER OR TRANSACTION, OR THE CONTINUATION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US, WHETHER ENTERED INTO BEFORE, ON, OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION BEFORE A PANEL OF INDEPENDENT ARBITRATORS SET UP BY EITHER THE NEW YORK STOCK EXCHANGE, INC., OR NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS I MAY DESIGNATE.

Because SAI drafted this arbitration clause, any ambiguity in the clause must be construed against SAI. *See, e.g., United States v. Seckinger*, 397 U.S. 203, 210 (1970); *Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 661-62 (Ala. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

Jim Burke Automotive, Inc. v. McGrue, 826 So. 2d 122, 132 (Ala. 2002) (holding that an arbitrator determines the issue of arbitrability when the arbitration clause specifically states that "the interpretation and scope of this clause and the arbitrability of any issue" was to be arbitrated). Consistent with this Court's decision in *First Options*, the Supreme Court of Alabama decided that the courts, and not an arbitrator, should decide whether the customer application forms that incorporated the arbitration clause were legally and validly made such that they could bind the parties.[9] Pet. App. 9a-10a.

In deciding whether the parties made legal and valid contracts by assenting to the customer application forms, the Supreme Court of Alabama was charged with applying "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.

The peculiar facts of this case, including Wolas registering under the alias "Allen Hengst" and forging that alias on the customer application forms, result in no contract being formed under Alabama law generally applicable to the

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[9] In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 592 (2002), this Court confirmed:

> [A] gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide. See [*First Options*, 514 U.S.], at 943-946, 115 S. Ct. 1920 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement). . . . Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. . . .
>
> "'[P]rocedural' questions which grow out of the dispute and bear on its final disposition" are presumptively not for the judge, but for an arbitrator, to decide. . . . So, too, the presumption is that the arbitrator should decide "allegation[s] of wavier, delay, or a like defense to arbitrability."

formation of securities contracts or other contracts. The Alabama Securities Act provides, in pertinent part:

> It is unlawful for any person *to transact business* in this state as a dealer or agent for securities unless he is registered under this article. It is unlawful for any dealer or issuer to employ an agent unless the agent is registered.

ALA. CODE § 8-6-3 (a) (2002) (emphasis added). And the Act further provides:

> (g) No person who has *made* or engaged in the performance of any *contract in violation* of any provision *of this article* . . . or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any action on the contract.

ALA. CODE § 8-6-19 (g) (2002) (emphases added).

Wolas "transact[ed] business" in Alabama beginning, at least, when he "made" the "contract[s]" by forging the signature of his criminal alias on each customer application form and ending when he absconded with the money that he had stolen from the Investors. As the Supreme Court of Alabama stated:

> [I]t is undisputed that, because of Wolas's dishonesty, the Commission registered Allen Hengst, who had no knowledge that Wolas had assumed his identity for that purpose. Therefore, we must conclude that Wolas and SAI violated § 8-6-3 (a).[10]

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[10] The Supreme Court of Alabama's interpretation of the Alabama Securities Act clearly applies to any contract made in violation of the securities law, not solely to arbitration clauses. Thus, the decision does not implicate the principle that the Federal Arbitration Act ("FAA") preempts any state law that specifically targets an arbitration clause for detrimental treatment. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.");

Similarly, under general Alabama contract law, a contract with a forged signature cannot be enforced. *See Ex parte Steadman*, 812 So. 2d 290, 293 (Ala. 2001) ("The requisite elements of [a contract] include: an offer and an acceptance, consideration, and *mutual assent* to terms essential to the formation of a contract.") (internal quotations omitted) (emphasis added); *see generally Conseco Finance Corp. of Alabama v. Slay*, 839 So. 2d 617, 618 (Ala. 2002) (noting with approval that a party conceded "that the trial court properly held that the question whether the signature on the contract purporting to be [plaintiff's] was forged was a question for a jury"); *Duckworth v. National Bank of Commerce*, 656 So. 2d 340, 344 (Ala. 1994) (noting the trial court's finding that a bank vice-president's forged signature on a contract imposed no binding obligation).[11]

Thus, unlike the contract in *Prima Paint*, 388 U.S. at 397-98, that was admittedly assented to by both parties and was later attacked on the grounds that fraud induced the assent of one of the parties, the customer application forms in this case were never validly assented to by both parties because the

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cf. id. at 688-89 (holding that the FAA pre-empted a Montana statute that, as interpreted by the state supreme court, specifically targeted arbitration clauses by conditioning their enforcement on compliance with special notice requirements); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 (1984) (holding that the FAA pre-empted a California statute that, as interpreted by the state supreme court, specifically targeted arbitration clauses by barring any waiver of a judicial trial).

[11] Moreover, because SAI and Wolas were not properly and legally registered to transact business in Alabama, no post-signing conduct of the parties could ratify or create any contract. *See* ALA. CODE §§ 8-6-3 (a) & 19(g) (2002); 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1139A at 398-99 (3rd ed. 1967) ("When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative ... It is pointed out that, since the forgery did not purport to be made on behalf of the person whose name was forged, there can be no ratification.")

signature of one party was a forgery, and the Investors did not assert fraudulent inducement. Based on the peculiar facts of this case, the Supreme Court of Alabama's decision is consistent with this Court's unanimous decision in *First Options*, 514 U.S. at 943-44.

B. The Decision of the Supreme Court of Alabama Does Not Conflict with Those Decisions of the Federal Circuit Courts of Appeal that Address Failure to Assent to a Contract Containing an Arbitration Clause.

Petitioner attempts to construct a conflict between the decision of the Supreme Court of Alabama and the decisions of the federal circuit courts of appeal regarding the applicability of *Prima Paint*'s severability doctrine under which an arbitrator decides questions of fraudulent inducement of a contract containing an arbitration clause, unless the fraudulent inducement specifically relates to the arbitration clause itself. *Prima Paint,* 388 U.S. at 403-04. While there is some disagreement among the federal circuit courts of appeal themselves over contracts that have been assented to, but are subject to a defense, there is no conflict with the peculiar facts of this case where Wolas's forged signature and other violations of Alabama law prevented a valid, binding contract from being made in the first place.

Several circuit courts have held that if an agreement is attacked as void, as opposed to voidable, the court decides whether the parties' claims are subject to arbitration. In *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), the Ninth Circuit held that *Prima Paint*'s severability rule required the arbitrator to decide claims of rescission of a contract made where, for example, the party opposing arbitration asserts fraud in the inducement, frustration of purpose, mutual mistake, or the minority status of a party as a defense to the entire contract.

Id. at 1140. However, the Ninth Circuit held that such rationale did not extend to claims that the underlying contract was void as having never been made where, for example, the party opposing arbitration asserts the lack of an agent's authority, signature on the wrong document, or failure to validly sign a document. *Id.* at 1141. The Ninth Circuit explained:

> [W]e read *Prima Paint* as limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to. A contrary rule would lead to untenable results. Party A could *forge* party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question whether it was bound to the contract, even if its charter prevented it from engaging in *any* arbitration.

Id. at 1140 (third emphasis added).

The Second Circuit, which this Court affirmed in *Prima Paint*, has also recognized that a court, and not an arbitrator, decides questions of arbitrability that attack the entire contract as void, such as a claim that the agent who signed a contract lacked authority to do so. *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2nd Cir. 2001); *accord Spahr v. Secco*, Nos. 00-1132, 00-1152, 2003 WL 212267775 (10th Cir. June 3, 2003) (holding that claim that an investment account contract was void for lack of mental capacity of one of the parties was for the court to decide); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3rd Cir. 2000) (holding that claim that purchase contract was void because agent lacked authority to enter into it was for the court to decide).

Some circuit courts, however, have held that if an agreement, to which both parties have assented, is attacked as void,

the arbitrator should decide. For example, the Eleventh Circuit has held that a challenge to a contract, to which the parties had assented, as being void *ab initio* for including a usurious interest rate was for the arbitrator to decide. *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002); *see generally Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (holding that claim that a contract, to which parties had assented, was void *ab initio* because it contained a usurious interest rate term was for the arbitrator to decide); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (holding that claim that a securities account contract, to which the parties had assented, was void because one of the parties lacked mental capacity was for the arbitrator to decide); *Burden v. Check into Cash of Kentucky, L.L.C.*, 267 F.3d 483 (6th Cir. 2001) (holding that claim that contract, to which parties had assented, was void because it contained a usurious interest rate was for the arbitrator to decide); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (holding that claim that a hedge contract, to which parties had assented, was illegal because one party had failed to comply with commodities regulations was for the arbitrator to decide); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993) (holding that claim that a franchise contract, to which parties had assented, should be rescinded was for arbitrator to decide); *Lawrence v. Comprehensive Bus. Svcs. Co.*, 833 F. 2d 1159 (5th Cir. 1987) (holding that claim that a contract, to which parties had assented, was void under the Texas Public Accountancy statute was for the arbitrator to decide); *Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524 (1st Cir. 1985) (holding that claim that a reinsurance contract, to which parties had assented, should be rescinded for frustration of purpose was for the arbitrator to decide).

None of the cases cited by Petitioner as requiring the arbitrator to decide issues of arbitrability, however, addresses facts in which one of the parties to the contract never assented

to, or signed, the contract or assented via an admittedly forged signature. As Judge Easterbrook stated for the Seventh Circuit in *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001):

> Many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being. See, e.g., *Sandvik AB v. Advent International Corp.* 220 F.3d 99, 105-09 (3d Cir. 2000); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 729 (8th Cir. 1976); *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925, F.2d 1136, 1139-42 (9th Cir. 1991); *Chastain* [*v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)]. Most of these decisions involve the same question as our case: whether a dispute about an agent's authority to bind the principal to the contract is arbitrable. *Every appellate court that has addressed this question has answered "no*, unless . . .". The "unless" clause reflects the fact that parties may agree separately to arbitrate disputes about whether they have agreed to the contract's substantive promises. See *First Options*, 514 U.S. at 943, 115 S. Ct. 1920.

(Emphasis added.) Indeed, in *Chastain v. Robinson Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992), cited by Judge Easterbrook, the Eleventh Circuit refused to enforce an arbitration agreement where a party claimed that her signature had been "forged."

In this case, Wolas, the fugitive from justice, forged the signature "Allen Hengst" on the customer application forms; thus there was no valid assent and no contract. The Supreme Court of Alabama held that a court should decide whether the Investors' underlying claims are subject to arbitration. On the particular facts of this case, no circuit court of appeal disagrees with that decision.

C. The Decision of the Supreme Court of Alabama Does Not Conflict with the Decisions of the State Courts of Last Resort.

Petitioner cites one decision from a state court of last resort, *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002), and admits that it does not conflict with the decision of the Supreme Court of Alabama. Pet. 18. Respondent has not located any decision of a state court of last resort decided after *First Options* that differs from the decision of the Supreme Court of Alabama on the facts of this case.[12] There is no conflict.

III. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Nor does the inherent importance of the question raised by this case to the federal and state courts of the nation warrant certiorari. Simply put, a brokerage company's hiring of a fugitive from justice who registers under a criminal alias with securities authorities, forges a signature on customer application forms, steals money from customers, and absconds

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[12] SAI also cites this Court to the decisions of several intermediate state appellate courts: *Riverwalk Apartments, LP v. RTM General Contractors, Inc.*, 779 So. 2d 537 (Fla. 2d DCA 2000); *Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (Ill. App. Ct. 2000); and *RPT of Aspen v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. Div. IV 1996). Pet. 18-19. These courts are not state courts of last resort. *See* FLA. CONST. art. V, § 3 (establishing Florida Supreme Court as state court of last resort); ILL. CONST. Art. VI, § 4 (same in Illinois); COLO. CONST. Art. VI, § 2 (same in Colorado). Because these courts are not state courts of last resort, their decisions are not appropriate for this Court's review. Sup. Ct. R. 10(b); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997). In any event, these decisions are consistent, as Petitioner admits, Pet. 18-19, with the decision of the Supreme Court of Alabama in this case.

before law enforcement authorities can arrest him is, thankfully, a rare occurrence. Resolution of such a peculiarly fact-bound case would be of little practical importance to the federal and state courts. *Cf. Fuller v. Oregon*, 417 U.S. 328, 328 (1974). Accordingly, Petitioner's attempt to compel arbitration based on the forged signature of its fugitive employee was correctly decided against Petitioner and presents no issue warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 27, 2003

APPENDIX

CURITIES AMERICA, INC. NEW ACCOUNT APPLICATION X Brokerage or ___Non-Brokerage (check one)
Member NASD/SIPC (Brokerage account carried by National Financial Services Corp.)

Right RR # _____ 3 Letter RR Code _____ Print RR Name _____ 76

NFSC Account Number | Type Account (NFSC Only): X Cash ___Margin* ___Option* ___DVP* *additional forms required

NFSC Brokerage Instructions: (will be coded to HOLD all & reinvest in mutual fund unless if not marked)

	Hold	Send
Proceeds	X	___
Securities	X	___
Dividends	X	___

If HOLD, which Money Mkt Sweep: ___076 ___077 ___079 ___058 X083 ___084 (default is 076)

IF HOLD, for mutual funds reinvest in: ___Shares or ___Money Mkt IF SEND: W M SM Q

IF HOLD, for stocks reinvest in: ___Shares (DRIP Application Required)

Registration:
Circle One: Individual Joint w/ Rights Comm Property TSA Non-NFS IRA Non-NFS SEP Non-NFS Roth Non-NFS Educ. UTMA/UGMA
Ten in Comm ___% ___% Partnership* Corp* Non-Corp* Trust* Estate* Indv TOD* Joint TOD* Non-NFS PSP/MPP* *additional papers required

Account Registration and Mailing Address (make sure client's address is indicated in addition to Third Party Custodian/TTEE address) Soc Sec/Tax ID #
George C. Edwards + Betty B. Edwards 261-72-7833
2527 N.W. 66th Terrace
Requires Legal Street Address in addition to any PO Box mailing address) Co-Owner Soc Sec #
(Betty) 411-86-1145
Gainesville State FL Zip 32606 Phone (352) 376-5461 Third Party Tax ID #
Client E-mail Address

Owner Birthdate 8-28-44 X US Citizen Annual Income 175,000 Tax Bracket (circle one):
Co-Owner Birthdate 6-22-48 ___Non-Res Alien ___Res Alien Net Worth 500,000 0% 15% 28%
___ Passport # ___ Liquid Net Worth 150,000 31% 38% above 38%

Investment Knowledge (choose one): ☐ Limited ☒ Good ☐ Excellent
Risk Exposure (choose one): ☐ Low ☒ Moderate ☐ Aggressive ☐ Speculation
Investment Objective (choose one): ☐ Current Income ☐ Balanced ☒ Growth & Income ☐ Growth ☐ Maximum Growth
Investment Experience: ☐ None ☒ Mutual Funds: 10 # yrs ☐ Partnerships: ___ # yrs ☐ Variable Products: ___ # yrs
☒ Stocks: 10 # yrs ☐ Bonds: ___ # yrs ☒ Equity Options: 10 # yrs ☐ Index Options: ___ # yrs

Primary Holder: Employer Name/Occupation self employed / Publisher
Joint Holder: Employer Name/Occupation self employed / Publisher
If not employed (choose one): ☐ Retired ☐ Student ☐ Other ___ And indicate source of income: ___
If any member of client's immediate family is employed by a Bank, Insurance Co., Investment Advisor or Broker, please indicate the name, relationship, and address of firm.
Name ___ Address ___ Relationship ___
Indicate the Public Corp. where the client or client's immediate family has ever been a corporate officer, director or 10% owner. Name ___

Under penalties of perjury, I (we) certify (1) the number shown on this form is my correct Taxpayer ID Number, and (2) I am not subject to backup withholding as a result of failure to report all interest or dividends, or (3) the Internal Revenue Service has notified me that I am no longer subject to backup withholding. Cross out (3) if subject to backup withholding. I understand that SAI will disclose my name to issuers of securities if securities are held in my account so that I can receive important information unless I notify SAI in writing that I do not consent. I further certify that I am at least 18 years of age and am of full legal age in the state in which I reside. I HEREBY ACKNOWLEDGE THAT I AM IN RECEIPT AND HAVE READ, UNDERSTOOD AND AGREED TO THE TERMS SET FORTH IN THE SAI CLIENT AGREEMENT AND THAT THIS ACCOUNT IS GOVERNED BY A PRE-DISPUTE ARBITRATION AGREEMENT WHICH I HAVE READ AND UNDERSTAND.

George C Edwards — Date — Betty B Edwards (BETTY) — Date
Client Signature — Client Signature

Registered Representative Signature — Date — OSJ Manager/Regional Supervisor Approval — Date

1196 (1/00)

BEST AVAILABLE COPY

77

ag Authority: ____ Full ____ Limited Trading Authority Name: _____ Relationship _____
itional forms required

icate Confirmations & Statements

nfirmations and Account Statements will be mailed to the client registration, the registered representative and any Third Party dian/Trustee whose address is listed in the registration section of the New Account Application. Please list any additional duplicate rmation and statement requests below:

_____ _____

_____ _____

_____ _____

_____ _____

itional Joint Holders:

me	Birthdate	Social Security Number	Employer Name	Occupation.
me	Birthdate	Social Security Number	Employer Name	Occupation.

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are not insured by the FDIC;
are not deposits or otherwise obligations of the financial institution;
are subject to investment risk, including possible loss of principal invested; and
are not insured by the SIPC as to the loss of principal amounts invested.

stablish a **Periodic Investment Plan (PIP)** or a **Systematic Withdrawal Plan (SWP)** on a Brokerage Account, please complete the parate form required to establish this service and attach it or send it in separately. Be sure to reference the client account number.

stablish different distribution options for each mutual fund position in your Brokerage Account, please complete the separate **DRIP** ...1. The mutual fund position must be in the account to code a different distribution option other than the basic account coding structions.

stablish a **Cash Management Account** with check-writing privileges, please complete a VIP or Brokerage Access application and an ldendum.

...porary accounts may be opened for CASH accounts that do not required additional paperwork (e.g., trust accounts cannot be assigned mporary account numbers). Temporary account numbers are only given when immediate trading is necessary.

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en making an investment through Securities America, Inc. the client should not make checks personally payable to the Registered ...ntative or any entity controlled by the Registered Representative.